Filed 6/23/09 P. v. Ledbetter CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KENNETH LEDBETTER, Defendant and Appellant.	C057751 (Super. Ct. No. 05F10707)

A jury found defendant Kenneth Ledbetter guilty of first degree burglary (Pen. Code, § 459; undesignated references are to this code), robbery in concert (§§ 211, 213, subd. (a)(1)(A)), being a felon in possession of a firearm (§ 12021, subd. (a)(1)) and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The jury found true the special allegations that another person other than an accomplice was present in the residence during commission of the burglary

(§ 667.5, subd. (c)(21)) and that defendant was a principal armed with a firearm when he committed the burglary and robbery (§ 12022, subd. (a)(1)). In a separate court trial, the court found true the allegations that defendant had two prior "strike" convictions. (§§ 667, subds. (b)-(i), 1170.12.) The court denied defendant's motion to strike one of the "strike" priors, and sentenced him to 52 years to life in state prison, plus 11 years.

On appeal, defendant contends the 25-year-to-life sentences for being a felon in possession of a firearm and possession of methamphetamine violate the ban against cruel and/or unusual punishment under the United States and California Constitutions. Defendant also contends he was denied his right to effective assistance of counsel. We will correct an error in the abstract of judgment and affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On November 24, 2005, defendant spent some time at the home of Anthony Ames, drinking and smoking marijuana. Defendant asked Ames if he would go with him somewhere, and Ames agreed. At approximately 2:00 p.m., defendant and Ames arrived at the home of David Smith,[1] an auto mechanic who had previously sold a Ford Explorer to defendant's wife and, when it "quit running,"

---

[1] Ames did not know Smith prior to the incident in question.

agreed to exchange it for a Chevy Camaro. Defendant gave Ames a handgun[2] and told him to grab a laptop.

Smith heard some noises at the front door. As he looked through the peephole, Ames broke down the door and rushed in with defendant. Defendant and Ames surrounded Smith and asked him, "Where's the money, where's the safe?" Smith told them there was no safe. Ames hit Smith in the face with the gun, knocking Smith to the floor and rendering him unconscious. Ames ran out of the house with the laptop and jumped into the car. A minute or so later, defendant got in the car. Ames handed him the laptop and they drove home.

By the time Smith regained consciousness, the police had arrived. Smith's computer and modem and other electronic items were missing. Although Smith was "badly" injured, having received wounds to his head and body, he refused medical treatment.

Within approximately 12 hours of the initial incident, defendant asked Ames if he would accompany him back to Smith's house to retrieve the Camaro. Ames and defendant returned to Smith's house. Smith was in bed, but went to the garage to meet them as soon as he was alerted they were there. Defendant and Ames led Smith to believe they had weapons and if he did not

---

[2] Ames testified he purchased the gun from defendant several months prior, and let defendant borrow it back prior to the crime.

cooperate, "it was going to get worse."[3] Defendant forced Smith to sign over the rights to the Camaro, telling Smith he "owed it to him." Defendant took the keys and he and Ames left, with defendant driving the Camaro.

On December 6, 2005, California Highway Patrol Officer Helen Gomez noticed defendant driving the Chevy Camaro without a seatbelt and pulled him over. When Gomez approached the Camaro, defendant dropped his hands down underneath the seat and out of view. Gomez instructed defendant to place his hands on the dash. He did so momentarily, then dropped his left hand back down out of sight. Gomez again instructed defendant to place his hands on the dash. When Gomez asked defendant for his license, registration and proof of insurance, defendant told her the car belonged to his wife and he did not have a license. She ran the license plate and discovered the car was stolen and called for backup.

When backup arrived, defendant was taken into custody. Officers searched the Camaro and found a loaded handgun under the driver's seat, and a box of ammunition and a shoulder holster in the car. Officers found a canister containing 2.9 grams of methamphetamine in the pocket of the jacket defendant was wearing, and a pipe in the center console of the car.

Ames testified that he borrowed the Camaro at least once in December 2005, placing the gun under the seat in the car. When

---

[3] However, Smith testified that defendant never said he had a weapon, nor did he gesture as though he did.

he returned the car to defendant, he forgot to retrieve the gun from under the seat.

When the Camaro was eventually returned to Smith, he found two cell phones inside, one of which had video images of defendant and Ames.

Defendant was charged with first degree residential burglary (counts one and three), robbery in concert (count two), carjacking (count four), unlawfully taking a vehicle (count five), being a felon in possession of a firearm (count six), and possession of methamphetamine (count seven). It was also specially alleged, as to count one, that defendant was a principal armed with a firearm and that another person other than an accomplice was present in the residence during commission of the burglary; as to count two, that defendant acted in concert and that defendant was a principal armed with a firearm; and as to all counts, defendant had two prior convictions, both strikes within the meaning of section 667, subdivisions (b) through (i) and 1170.12.

The jury found defendant guilty of counts one, two, six and seven and found the special allegations true. In a court trial, the court found the two prior "strike" conviction allegations true.

Defendant filed a motion to strike one of his "strike" priors. The court denied the motion and sentenced defendant as follows: 27 years to life for count two, a consecutive term of 25 years to life for count six, a concurrent term of 25 years to life for count seven, 25 years to life for count one (stayed

pursuant to section 654), plus one year for the firearm enhancement and five years for each of the prior conviction enhancements, for an aggregate prison sentence of 52 years to life, plus a determinate term of 11 years.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Cruel and Unusual Punishment

Defendant contends his sentences of 25 years to life for possession of methamphetamine and for possession of a firearm by an ex-felon both constitute cruel and unusual punishment under the United States Constitution and cruel or unusual punishment under the California Constitution. He argues his failure to raise his constitutional claims below does not preclude us from considering them on appeal, and argues further that any failure to raise the claims was the result of ineffective assistance of counsel. Respondent argues the claims were indeed forfeited by defendant's failure to raise them and, in any event, the claims lack merit.

Assuming defendant's contentions are not forfeited for failure to raise them in the trial court (see *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; *People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5; but see *People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27), they fail on the merits.

Under the proscription of "cruel and unusual punishment" in the Eighth Amendment to the United States Constitution

(applicable to the states via the Fourteenth Amendment), a "'narrow proportionality principle . . . applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108, 117] (*Ewing*), quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 [115 L.Ed.2d 836, 865-866] (*Harmelin*).) This constitutional principle "forbids only extreme sentences that are 'grossly disproportionate' to the crime." (*Ewing, supra*, 538 U.S. at p. 23 [155 L.Ed.2d at p. 119], quoting *Harmelin, supra,* 501 U.S. at p. 1001 [155 L.Ed.2d at p. 869].)

Objective factors guiding the proportionality analysis include "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for the commission of the same crime in other jurisdictions." (*Solem v. Helm* (1983) 463 U.S. 277, 292 [77 L.Ed.2d 637, 650].) But only in the rare case where the first factor is satisfied does a reviewing court consider the other two factors. (*Harmelin, supra*, 501 U.S. at p. 1005 [115 L.Ed.2d at pp. 871-872] (conc. opn. of Kennedy, J.).)

The United States Supreme Court rejected an Eighth Amendment challenge to a 25-years-to-life Three Strikes sentence in *Ewing, supra*, 538 U.S. 11 [155 L.Ed.2d 108], noting that recidivism has traditionally been recognized as a proper ground for increased punishment. (*Id.* at p. 25 [at p. 120].) Given the defendant's long criminal history, the court held that the defendant's punishment was not disproportionate despite the

relatively minor character of his current felony. (*Id.* at p. 29 [at p. 122].)

Here, defendant's criminality began in 1989 with a conviction for driving under the influence. Over the next four years, defendant was convicted of three crimes of violence against various girlfriends, possession of narcotics, theft, and weapons charges, culminating in convictions in two separate incidents in 1993, one for assault with a firearm and one for robbery, resulting in a 16-year state prison sentence. He was paroled in May 2004, but returned to custody four times for use of methamphetamine and heroin, absconding and possession of drug paraphernalia. Defendant's parole agent noted that defendant's adjustment to parole was "horrible," and characterized him as a "drug addict with a high risk for potential violence."

Defendant's behavior while incarcerated mirrors his behavior outside of prison. While in prison, he was involved in six separate incidents, five of which involved violence against other inmates, and two of which involved the use of "pruno," a fermented fruit drink.

Defendant claims that, because he possessed only "a small amount of methamphetamine," the punishment is grossly disproportionate to the crime, urging us to reach the same conclusion as that in *People v. Carmony* (2005) 127 Cal.App.4th 1066 (*Carmony*). In *Carmony,* the defendant failed to register as a sex offender within five days of his birthday, thus violating section 290, for which the defendant received a state prison sentence of 26 years to life. (*Carmony, supra,* 127 Cal.App.4th

at p. 1074.) We reversed, finding that, under the circumstances of the case, the sentence constituted cruel and unusual punishment because the "offense was an entirely passive, harmless, and technical violation of the registration law . . . ." (*Id.* at p. 1077.) Such is not the case here.

Defendant has a history of illicit drug use and weapons charges, both of which often play a pivotal role in the commission of other crimes. Just one year prior to the instant offenses, defendant was still considered by his parole officer to be a "drug addict with a high risk for potential violence," despite having spent a significant amount of time in prison.

The gravity of defendant's recent offenses is demonstrated by the harm threatened to the arresting police officer and the public. Defendant twice dropped his hands out of the officer's sight and down close to the location where the gun was later found, despite repeated instructions from Officer Gomez to keep his hands on the dash. Needless to say, this placed everyone in the vicinity of the traffic stop at risk. Furthermore, the fact that defendant was found to be in possession of 2.9 grams of methamphetamine, along with a pipe in the center console of the car, suggests his addiction to drugs was ongoing, placing those around him at further risk of harm, given that he was operating a motor vehicle and had ready access to a drug that would likely impair his ability to do so. Defendant's punishment was not grossly disproportionate in light of his prior record and totality of the circumstances surrounding the commission of the offense. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502,

1510 (*Martinez*) [possession of methamphetamine]; *People v. Cooper* (1996) 43 Cal.App.4th 815, 824-825 [possession of firearm by ex-felon].)

Similarly, article I, section 17 of the California Constitution proscribes "cruel or unusual punishment." Although this language is construed separately from the federal constitutional ban on "cruel and unusual punishment" (*Carmony, supra*, 127 Cal.App.4th at p. 1085), the method of analysis is similar: the reviewing court considers "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society"; the comparison of "the challenged penalty with the punishments prescribed in the same jurisdiction for different offenses"; and the comparison of "the challenged penalty with the punishments prescribed for the same offense in other jurisdictions . . . ." (*In re Lynch* (1972) 8 Cal.3d 410, 425-427.) The purpose of this analysis is to determine whether the punishment is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Id.* at p. 424.)

We do not find that this is one of those rare cases where the sentence is so disproportionately harsh as to shock the conscience or to offend fundamental notions of human dignity. (See *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631.) As previously discussed in this opinion, defendant's past and present offenses are grave. His abiding addiction to drugs, as well as his apparent disregard for the prohibition against

possessing firearms, only exacerbates each circumstance. His punishment is not disproportionate to that inflicted on other recidivists under the Three Strikes law.

Defendant cites numerous cases in support of his argument that the punishment in other states for "a similar drug offense" shows his punishment is cruel and unusual. Those arguments are unpersuasive. Defendant received a 16-year state prison sentence after being convicted of committing violent offenses. As a result, he is prohibited from possessing a firearm. Yet, within a year of being paroled following completion of a lengthy prison sentence, defendant not only committed the crimes against Smith, but was thereafter found in possession of both a handgun and methamphetamine, not to mention the stolen vehicle. Defendant continues to violate parole and continues to feed his drug addiction, doing nothing to demonstrate an interest in abiding by the law. In any event, the interjurisdictional test does not require proof that California's sentencing scheme as to recidivists is less harsh than others. (*Martinez, supra*, 71 Cal.App.4th at p. 1516.)

Defendant has not shown that his punishment was "cruel and unusual" under the federal Constitution, or "cruel or unusual" under the California Constitution.

II

Ineffective Assistance of Counsel

Defendant contends the failure to object to his sentence as cruel and/or unusual was the fault of his ineffective trial counsel. Because we addressed the merits of defendant's

constitutional claims despite his failure to raise them below, we need not address his claim of ineffective assistance of counsel in that regard.

Defendant also contends his trial counsel failed to secure a ruling on his request to strike one of his prior "strike" convictions as to counts six and seven.

To prevail on a claim of ineffective assistance of counsel, defendant must establish his attorney's representation fell below professional standards of reasonableness and must affirmatively establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693]; *People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

Defendant filed a motion to strike a "strike" prior as to all counts, and the court denied that motion based on defendant's "lengthy" criminal history, the nature of the offense and other information regarding defendant as set forth in the probation report. Any further efforts expended by counsel to have the court strike the "strike" prior as to counts six and seven only would therefore have been futile. (*People v. Osband* (1996) 13 Cal.4th 622, 678.)

III

As the People correctly point out, the oral pronouncement of judgment and the abstract of judgment erroneously refer to counts seven and eight. However, the controlling charging document, i.e., the first amended information, the minute order, and the jury verdicts correctly set forth the relevant counts as six and seven. It is clear from the record that the trial court

simply misspoke in referring to counts seven and eight. In the absence of judicial error, we shall direct the trial court to correct the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment consistent with this opinion, and to forward an amended abstract to the Department of Corrections and Rehabilitation.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

BUTZ, J.